IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROGER DALE GODWIN,

ORDER

Plaintiff,

10-cv-573-bbc

v.

NANCEY TIDQUIST, TAMMY MAASSEN,
DR. ADLER, RANDALL HEPP, JODI DOUGHERTY,
HOLLY A. GUNDERSON, RICK RAEMISCH,

Defendants.

- -

Plaintiff Roger Dale Godwin, a prisoner at the Jackson Correctional Institution, is proceeding on Eighth Amendment claims against defendants Dr. Adler, Nancey Tidquist, Tammy Maasen, Randall Hepp, Holly Gunderson, Jodi Dougherty and Rick Raemisch for failing to provide him with adequate treatment for his serious skin condition. In the process of briefing plaintiff's motion for preliminary injunctive relief, defendants argued that plaintiff failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a), so the court requested supplemental briefing on this issue. Now the parties have completed briefing that motion. Because the parties have submitted evidentiary materials in support of their briefs, I will consider defendants' motion as one for summary judgment. In addition,

plaintiff has filed several other motions, including a motion to disqualify Magistrate Judge Crocker and me from this case and a motion to "countersue" two new defendants.

After considering the documents filed by the parties, I conclude that there is no need to disqualify myself in this case. Further, I conclude that plaintiff has failed to exhaust his administrative remedies, so I will dismiss the case without prejudice. Plaintiff's remaining motions will be denied as moot.

MOTION FOR RECUSAL

Plaintiff has filed a motion seeking my and Magistrate Judge Stephen Crocker's recusal from this case, stating that we cannot be impartial because plaintiff has previously made threats to injure or kill us. 28 U.S.C. §§ 144 and 455 apply to motions for recusal and disqualification of judges. Section 144 requires a federal judge to recuse herself for "personal bias or prejudice." Section 455(a) requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and section 455(b)(1) provides that a judge shall disqualify herself if she "has a personal bias or prejudice concerning a party." Because the phrase "personal bias or prejudice" found in § 144 mirrors the language of § 455(b), they may be considered together. Brokaw v. Mercer County, 235 F.3d 1000, 1025 (7th Cir. 2000). Recusal is required when a "'reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits'" Id. (quoting In Re Mason, 916 F.2d, 384, 385 (7th Cir. 1990).

Where a judge is threatened by a party, recusal is required if it appears that the threat

is genuine and not just motivated by a desire for recusal. In re Nettles, 394 F.3d 1001, 1002 (7th Cir. 2005). For instance, in Nettles, the Court of Appeals for the Seventh Circuit ordered the recusal of the district judge as well as all of the court of appeals judges after the criminal defendant was charged with plotting to blow up the Dirksen Courthouse in downtown Chicago. Id.

In his original motion for recusal, plaintiff states that in both January 2009 and April 2011 he threatened to kill Magistrate Judge Crocker and me, but he provides no evidence to support this claim. A party moving for recusal has the burden of producing facts that would raise doubts about the judge's impartiality. In re Betts, 165 B.R. 233, 238 (Bankr. N.D. Ill. 1994). Now plaintiff has submitted a document titled "Motion [to] Volunteer to be Prosecuted for Threats Toward Magistrate Barbara B. Crabb, Magistrate Steven L. Crocker." Plaintiff attaches to this motion a handwritten document dated February 7, 2011, in which he threatens me, Magistrate Judge Crocker, FBI agents and Wisconsin state Senator Lena Taylor. (This document appears to bear a stamp showing that the document was received in this court but it does not appear in the court's electronic record.) A further search of court records show that in June 2011, plaintiff submitted documents (filed in this court's miscellaneous file) stating that he and his "anti-government terrorist organization" have plotted to kill me, Magistrate Judge Crocker, President Obama, ex-Vice President Cheney and other officials.

These threats seem to be so broad and made against such a wide-ranging group of officials that I cannot consider them to be genuine, particularly when most of them appear

to have been issued during the pendency of this action, raising suspicion that plaintiff has made the threats in order to obtain my recusal. Recusal is not warranted where there is reason to believe that the threats were made in an attempt to obtain a different judge. In re Nettles, 394 F.3d at1002; United States v. Greenspan, 26 F.3d 1001, 1006 (10th Cir. 1994). Accordingly, I will deny plaintiff's motion for recusal, at least as it pertains to me. Usually, Magistrate Judge Crocker would rule on the motion for his disqualification, although I note that the motion will become moot now that the case will be dismissed for plaintiff's failure to exhaust his administrative remedies.

As for the motion in which plaintiff asks to be prosecuted, this court cannot initiate a criminal proceeding. However, I will attempt to fulfill plaintiff's request by sending a copy of his motion to the United States Attorney for the Western District of Wisconsin.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Because I am denying plaintiff's motion for recusal, I will now consider defendants' motion for summary judgment on the ground that plaintiff failed to exhaust his administrative remedies. From the documents submitted by the parties, I find the following facts to be material and undisputed.

A. Undisputed Facts

Since April or early May 2010, plaintiff Roger Dale Godwin has been incarcerated at the Jackson Correctional Institution, located in Black River Falls, Wisconsin. Plaintiff suffers

from a skin disorder, that can cause him dry skin, rashes, itching, burning and pain.

On September 6, 2010, plaintiff filed inmate grievance JCI-2010-18498, complaining that defendant Dr. Adler had failed to see him for an August 31, 2010 appointment, and that defendant Tidquist, a nurse practitioner, did not conduct a full examination or prescribe anything when they met on September 1, 2010. Defendant institution complaint examiner Jodi Dougherty recommended dismissing the grievance on September 13, 2010. She noted that plaintiff had been seen by a Nurse Thompson, by defendant Tidquist and by defendant Adler on separate occasions between August 12, 2010 and September 2, 2010, that he had been prescribed Hydrocerin cream and Loratadine, given a handout for dry skin and encouraged to shower every other day and drink plenty of fluids. Dougherty recommended dismissal because she was not in the position to question the decision of medical professionals.

Plaintiff appealed this decision to the corrections complaint examiner. His appeal was dated September 15, 2010 and marked received on September 20, 2010. Later on the same day (September 20), the Corrections Complaint Examiner's Office returned plaintiff's appeal because plaintiff had submitted a photocopied version of the form, in violation of the instructions on the form requiring him to submit the original form. The Corrections Complaint Examiner's Office received plaintiff's corrected appeal on September 27, 2010. On September 30, 2010, corrections complaint examiner Welcome Rose recommended that plaintiff's appeal be dismissed as untimely, stating:

> Wisconsin Administrative Code, s. DOC 310.13(1), requires appeals to be received and accepted at the Corrections Complaint Examiner's Office within ten calendar days after the reviewing authority's decision. Noting the complaint was decided on 09/14/10, the appeal was not received until 09/27/10, and further noting the complainant offers no good cause for the late submission, it is recommended this appeal be dismissed as untimely.

On October 1, 2010, the Office of the DOC Secretary accepted Rose's recommendation and dismissed plaintiff's appeal.

On October 14, 2010, plaintiff filed inmate grievance JCI-2010-21388, stating that defendants Maassen and Adler were not treating his skin condition, that Adler had missed an October 5, 2010 appointment and that Maassen, defendant Warden Randall Hepp and department Secretary Rick Raemisch did not respond to his complaints about the skipped appointment. On October 14, 2010, defendant Dougherty reviewed the grievance, stating that plaintiff's "issue regarding medical treatment for dry skin was previously addressed in JCI-2010-18498." Regarding plaintiff's October 5, 2010 appointment, Dougherty noted that plaintiff was on the appointment list that day, but had to be rescheduled to meet with a nurse practitioner on October 26, 2010 because defendant Adler and did not have enough time to meet every scheduled inmate. Dougherty recommended affirming the disposition of the complaint "solely because the appointment was rescheduled." On October 15, 2010, defendant Gunderson affirmed the disposition.

On October 19, 2010, plaintiff filed inmate grievance JCI-2010-21926, complaining that defendant Maassen was not answering his correspondences. On October 26, 2010, defendant Dougherty recommended dismissing the grievance, stating that she had talked

with Maassen, who said that she was working on responding to several complaints of plaintiff's. On November 2, 2010, defendant Hepp dismissed the grievance. Plaintiff did not appeal the dismissal.

On January 10, 2011, plaintiff filed inmate grievance JCI-2011-650, complaining that the health services unit was ignoring his medical care. On January 19, 2011, defendant Dougherty recommended dismissing the complaint, stating that plaintiff had been seen by medical staff five times between November 15, 2010 and January 4, 2011. On January 22, 2011, defendant Gunderson dismissed the grievance. Plaintiff did not appeal the dismissal.

B. Discussion

The 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Failure to exhaust is an affirmative defense that defendants have the burden of pleading and proving. Jones v. Bock, 549 U.S. 199, 212 (2007); Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). Once defendants raise failure to exhaust as a defense, district courts lack discretion to decide claims on the merits unless the exhaustion requirements have been satisfied. Woodford v. Ngo, 548 U.S. 81, 83-85 (2006); Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002).

Generally, to comply with § 1997e(a), a prisoner must "properly take each step within

the administrative process." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). This includes following instructions for filing the initial grievance, Cannon v. Washington, 418 F.3d 714, 718 (7th Cir. 2005), as well as filing all necessary appeals, Burrell v. Powers, 431 F.3d 282, 284-85 (7th Cir. 2005), "in the place, and at the time, the prison administrative rules require." Pozo, 286 F.3d at 1025. The purpose of these requirements is to give the prison administrators a fair opportunity to resolve the grievance without litigation. Woodruff, 548 U.S. at 88-89.

Under the Wisconsin administrative code, prisoners start the grievance process by filing an offender complaint with the institution complaint examiner. Wis. Admin. Code §§ DOC 310.09, 310.10 and 310.16(4). As a general rule, an offender complaint must be filed within 14 calendar days of the occurrence giving rise to the complaint. Id. § DOC 310.09(6). An institution complaint examiner must then acknowledge receipt of the offender complaint within five working days of its receipt. Id. § DOC 310.11(2). After reviewing the complaint, an institution complaint examiner may reject it for failure to meet filing requirements, investigate it, recommend to the appropriate reviewing authority that the complaint be granted or dismissed or direct the prisoner to attempt to resolve the complaint informally before proceeding with a formal offender complaint. Id. §§ DOC 310.07(2), 310.09(4). Once the institution complaint examiner makes a recommendation that the grievance be granted or dismissed on its merits, the appropriate reviewing authority may dismiss or affirm the grievance or return it for further investigation.

Id. § DOC 310.12. A prisoner may also appeal to a corrections complaint examiner if the prisoner disagrees with the decision of the reviewing authority. Id. § DOC 310.13.

The corrections complaint examiner is then required to conduct an additional investigation when appropriate and make a recommendation to the Secretary of the Wisconsin Department of Corrections. Id. § DOC 310.13. Within ten working days following receipt of the corrections complaint examiner's recommendation, the Secretary must accept the recommendation in whole or with modifications, reject it and make a new decision or return it for further investigation. Id. § DOC 310.14.

Defendants contend that they should be granted summary judgment because plaintiff has not exhausted any of his inmate grievances. Plaintiff provides a copy of his inmate grievance history and circles various grievances, presumably in an attempt to indicate which ones show that he has exhausted his claims. However, these grievances either took place at other prisons, did not relate to the claims at issue in this case or were not fully exhausted. Turning to the grievances identified by defendants, there seems to be no doubt that plaintiff failed to exhaust grievances nos. JCI-2010-21926 and JCI-2011-650 because he never appealed those decisions to the corrections complaint examiner. Further, although grievance no. JCI-2010-18498 was rejected on extremely technical grounds (plaintiff failed to submit the original copy of his appeal on time, only a *photocopy* of the grievance, in contravention of an instruction on the appeal form), prisoners must exhaust administrative remedies in the manner prescribed by administrative rules, Conyers v. Abitz, 416 F.3d 580, 584 (7th Cir.

2005). The claims in these three grievances must be dismissed without prejudice for plaintiff's failure to exhaust.

That leaves grievance no. JCI-2010-21388. Some of plaintiff's claims in this grievance were rejected as duplicative of those raised in JCI-2010-18498. Wis. Admin. Code § DOC 310.11(5)(g). The other part of this grievance, plaintiff's claim that defendant Adler skipped his October 5, 2010 appointment, was affirmed by defendant Gunderson. Therefore, plaintiff has exhausted this claim against Adler. Thornton v. Snyder, 428 F.3d 690, 696 (7th Cir. 2005) ("Prisoners are not required to file additional complaints or appeal favorable decisions."). However, this claim is not part of the present lawsuit; plaintiff's October 5, 2010 appointment occurred *after* the October 4, 2011 filing of his lawsuit and plaintiff has not sought leave to amend his complaint to include this claim.

Thus, defendants have shown that plaintiff has failed to exhaust his administrative remedies with respect to any of the claims raised in this lawsuit. The case will be dismissed without prejudice to plaintiff's filing a new lawsuit at a later date, after he has exhausted his administrative remedies. Plaintiff's motion for preliminary injunctive relief will be denied as moot.

MOTION TO COUNTERSUE

Plaintiff has filed a host of other motions in this case, all of which can be denied as moot without further discussion, because this case must be dismissed for plaintiff's failure to exhaust his administrative remedies. The one exception is plaintiff's motion to

"countersue" non-parties Michael Scharpf, a captain at the Jackson prison, and John Sweeney, an assistant attorney general representing defendants, for "fabrication, lies, [and] purjury." Plaintiff alleges also that Scharpf has threatened him in prison.

I will address this motion to make clear that plaintiff cannot extend the life of this case by tacking on new claims against new defendants. Even if I were not dismissing the case for plaintiff's failure to exhaust his administrative remedies, I would deny plaintiff's motion to supplement his complaint (there is no need for plaintiff to "countersue"; he is the plaintiff) because his new claims are not related to those that are the subject of this lawsuit. Fed. R. Civ. P. 20. If he wishes to sue Sweeney and Scharpf he will have to do it in a new lawsuit.

ORDER

IT IS ORDERED that

1. Plaintiff Roger Dale Godwin's motion for my recusal, dkt. #40, is DENIED.

2. Defendants' motion for summary judgment filed by defendants Dr. Adler, Nancey Tidquist, Tammy Maasen, Randall Hepp, Holly Gunderson, Jodi Dougherty and Rick Raemisch, dkt. #23, is GRANTED. This case is DISMISSED without prejudice for plaintiff's failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a).

3. Plaintiff's remaining motions are DENIED as moot.

4. Plaintiff is obligated to pay the $350 filing fee for this case in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Jackson

Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 10th day of August, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge